

OSHAB FINAL PROCEDURAL REGULATIONS, 8-1-2016

346. OSHAB Appeals Scheduling and Information System – OASIS.

- (a) The California Occupational Safety and Health Appeals Board's (OSHAB's) document management, case management and court calendaring system is known as OASIS.
- (b) OASIS is an acronym for OSHAB Appeals Scheduling and Information System.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 6603, Labor Code.

346.1. Validity of Scanned Documents.

(a) When the Appeals Board scans a document in the OASIS file, the scanned document shall be deemed identical to the original document.

(b) The following differences in the scanned document do not preclude it from being deemed identical to the original document:

(1) The physical dimensions of a scanned document may be slightly different than the original;

(2) The Appeals Board's scanning process may affix to the scanned document a bar code, unique number, or any other marking necessary to scan or index the document.

(c) If a party, intervenor, obligor or their representatives contest the validity of a scanned document, the party, intervenor, obligor, or their representatives has the burden of proof to show good cause why the contested document should be excluded as evidence pursuant to the following criteria:

(1) Excepting the changes to a scanned document identified in subsection (b), the party or participant contesting the validity of the scanned document shall prove by a preponderance of the evidence that the document's content has been materially altered after it has been scanned; and

(2) The party or participant contesting the validity of the scanned document shall prove by a preponderance of the evidence that the changes to the document render the changed document unreliable as evidence.

(d) Prior to being scanned into the hearing record, documents and photographs that are used as hearing exhibits may be altered during the course of the hearing for demonstrative purposes. Witnesses may mark photographs or other exhibits to identify a physical location or to illustrate a clarifying point. The marked or altered document and the original unmarked document may both be entered into evidence if in the discretion of the Administrative Law Judge entering both documents into evidence is necessary for the maintenance of a clear record.

(e) Nothing in this section abrogates the responsibility of parties to authenticate documents at hearing for the purpose of entering them into evidence.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 6603, Labor Code.

346.2. Official Record and OASIS Electronic File.

(a) OASIS stores documents in electronic form. When OASIS becomes operative, the official administrative record of an appeal shall be those electronic documents and evidence stored in the OASIS electronic file, except that:

(1) Oversized, demonstrative, or other non-standard sized documentary evidence incapable of being scanned into an electronic form but admitted into evidence at a hearing shall be retained outside of OASIS pursuant to the provisions of Section 376.4 and continue to be part of the administrative record.

(b) After OASIS becomes operative, electronic filing via OASIS is preferred, but not mandatory. All documents submitted to the Appeals Board in a non-electronic format shall be scanned into an electronic format and placed into the corresponding electronic case file, except for documents lodged with the Appeals Board for in camera inspection.

(1) A document scanned into the OASIS case file shall have the same authenticity and evidentiary value as the original document.

(2) After being scanned into OASIS, the original document shall be retained for at least six months. Following this six-month period, the Appeals Board may destroy the original paper documents.

(c) The OASIS electronic file shall be retained and remain accessible until withdrawal of the appeal or final disposition of the proceeding. At the time of the final disposition of the proceeding, the OASIS electronic file shall be electronically archived in a retrievable format for a three-year period following the conclusion of legal proceedings. At the expiration of the three-year period, the Appeals Board shall purge and destroy the electronic file.

(d) Parties, intervenors, obligors and their representatives may file specified documents in an electronic form pursuant to Section 355.4, subsection (f). Documents filed in electronic form shall have the same legal effect as a document in paper form.

(e) The Appeals Board may electronically file any decision, findings, order, decision after reconsideration, denial of reconsideration or any other official document produced by the Appeals Board in accordance with Section 355.2. Any document that is electronically filed by the Appeals Board shall have the same legal effect as a document in paper form.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 6603, Labor Code.

347. Definitions.

For the purpose of these rules:

(a) "Administrative Law Judge" means any person appointed by the Appeals Board pursuant to Labor Code Sections 6605 and 6607 as a hearing officer to conduct hearings and to decide matters within the jurisdiction of the Appeals Board;

(b) "Administrative Record" includes the following:

(1) Pleadings;

(2) All notices issued to parties;

(3) All orders issued;

(4) Any decision by an Administrative Law Judge;

(5) The final decision;

(6) Emails received from or sent to parties to the case;

(7) The hearing record as defined by subsection (r);

(8) Petition(s) for reconsideration and answers;

(9) Dispositions of petitions for reconsideration;

(10) Other documents entered into the record by the Appeals Board after a "Petition for Reconsideration" is received;

(11) Briefs;

(12) Motions;

(13) Stipulations;

(14) Party correspondence related to the proceeding;

(15) Other documents submitted by the parties related to the hearing; and

(16) Official Address Record;

~~(b)~~ (c) "Affected Employee" means an employee of a cited employer who is exposed to the alleged hazard described in the citation as a result of assigned duties;

(ed) "Appeals Board" or "Board" means the Occupational Safety and Health Appeals Board, and includes the chairperson and members of the Appeals Board, Administrative Law Judges, and staff of the Appeals Board;

(de) "Authorized Employee Representative" means a labor organization which has a collective bargaining relationship with the cited employer and which represents affected employees or an employee organization which has been formally acknowledged by a public agency as an employee organization that represents affected employees of the public agency;

(ef) "Completed Appeal Form" means all required blanks filled in and boxes checked, with the signature of information submitted in writing, signed by employer or employer's representative, and the citation(s) that are the subject of the appeal, and notification of penalty appealed from attached to the appeal form.

(fg) "Day", unless specifically stated otherwise means calendar day;

(h) "Decision by an Administrative Law Judge" means a decision signed and issued by the Administrative Law Judge and submitted by the Administrative Law Judge to the Appeals Board;

(gi) "Declaration" means a certification in substantially the following form:

~~-(1) If executed within California:~~

~~-I declare under penalty of perjury that the foregoing is true and correct.~~

~~-Executed at _____ (City), California on _____ (Date),~~

~~-(Signature) _____ (Typed or printed name)~~

~~-(2) If executed outside California:~~

~~-I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.~~

~~_____ (Signature) _____~~

~~—(Date) (Typed or printed name)~~

I, [identify declarant], declare that I have personal knowledge of the following facts:

1.....

2.....

3.....

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at (city) , California (or other state/country) on (date).

(Signature)

~~(h)~~ "Division" means the Division of Occupational Safety and Health;

~~(i)~~ "Division Action" means any citation, notice, special order, order to take special action, notification of penalty, notification of failure to abate alleged violation and of additional civil penalty, or notification of failure to return a signed statement of abatement issued by the Division pursuant to Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or Section 2950 of the Health and Safety Code, which by statute may be appealed to the Appeals Board;

~~(j)~~ "Docketed" Appeal" means ~~any completed appeal form which has been received by the Appeals Board and assigned a specific docket number;~~ the Appeals Board has acknowledged receipt of all information required under these rules to initiate and perfect an appeal as required by Sections 355.1, 355.3, 355.4, 359, 359.1, and 361.3;

(m) "Electronic Signature" means an electronic symbol (e.g., a graphic representation of a person in JPEG file), or process (e.g., a procedure that conveys assent), attached to or logically associated with a record, and executed or adopted by a person with the intent to sign the record;

(kn) "Employee" means every person who is required or directed by any employer, to engage in any employment, or to go to work or be at any time in any place of employment;

(lo) "Employee Appeal" means any appeal filed by an employee from the period allowed by the Division to abate the alleged violation;

(mp) "Employer" means the state and every state agency, each county, city, district, and all public and quasi-public corporations and public agencies therein, every person including any public service corporation, which has any natural person in service, and the legal representative of any deceased employer;

(nq) "Hearing" means any hearing before the Appeals Board or an Administrative Law Judge set for the purpose of receiving evidence;

(or) "Hearing Record" means the official record of evidence taken ~~by electronic device in any proceeding before the Appeals Board;~~ during, and if allowed by order after, the hearing until the Appeals Board or Administrative Law Judge conducting the hearing orders the record closed to further evidence. The "Hearing Record" contains the hearing recording as described in Section 376.7, all documentary evidence and other evidence offered or admitted during the hearing or by affidavit (excluding withdrawn documents), such as admitted confidential evidence sealed from further disclosure by order of the Administrative Law Judge, admitted confidential evidence described in Section 376.6, and physical, mechanical or demonstrative exhibits returned to a party for storage pursuant to Section 376.4;

(ps) "Intervenor" means a person, group of persons, trade association, legal foundation, or public or private interest group who has been granted leave to intervene in any proceeding;

(qt) "Memorandum of Items of Costs" means an itemization of costs claimed pursuant to Section 149.5 of the Labor Code;

(ru) "Obligor" means a person other than an employer who is obligated to an employer to repair any machine, device, apparatus, or equipment and to pay any penalties assessed against an employer;

(sy) "Participation Notice" means a notice informing affected employees of their right to participate in certain proceedings;

(tw) "Party" means a person who has made an appearance before the Appeals Board and been granted party status;

(ux) "Person" means an individual, firm, partnership, trust, estate, association, corporation, company, or other entity;

(vy) "Petition for Costs" means any claim for reasonable costs to be awarded by the Appeals Board pursuant to Section 149.5 of the Labor Code;

(z) "Pleading" means a citation, notification of penalty, paper or electronic appeal form, other document or information submitted in place of an appeal form, and amendments thereto which contain the allegations of the parties of their respective charges and defenses;

~~(waa)~~ "Proceeding" means any adjudicatory action begun by the filing of an appeal and includes a hearing, prehearing conference, petition for costs, reconsideration, or any other act that may result in an order or decision of the Appeals Board;

~~(xbb)~~ "Representative" means a person authorized by a party or intervenor to represent that party or intervenor in a proceeding;

~~(ycc)~~ "Rule" means any section set forth in this chapter adopted by the Appeals Board;

~~(zdd)~~ "Working Days" means any day that is not a Saturday, Sunday or State-recognized holiday as provided in Government Code Sections 6700 and 6701.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 2015.5, Code of Civil Procedure; and Sections 148.7, 149.5, 6301, 6302, 6304, 6304.1, ~~and~~ 6305(b); and 6603, Labor Code.

348. Computation of Time.

(a) In computing the time within which a right may be exercised or an act is to be performed, the first day shall be excluded and the last day shall be included. If the last day is not a working day, time shall be extended to the next working day.

(b) Unless otherwise indicated by proof of service, if the envelope was properly addressed, the mailing date shall be presumed to be:

(1) the postmark date appearing on the envelope if first-class postage was prepaid; or

(2) the date of delivery to a common carrier promising overnight delivery as shown on the carrier's receipt.

(c) Where service of any document, letter, application, request, motion, pleading, brief, decision, petition, answer, memorandum, response, or other writing is by mail or email, and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed is extended five days if the place of address is within the State of California, and 10 days if the place of address is outside the State of California but within the United States. Such extension shall not apply to extend the time for filing an appeal.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 1013(a), Code of Civil Procedure; and Sections 148.7, ~~and~~ 149.5, and 6603, Labor Code.

350.3. Administrative Adjudication Code of Ethics.

The Administrative Adjudication Code of Ethics defined in Government Code section 11475 is adopted and shall apply to Administrative Law Judges of the California Occupational Health and Safety Appeals Board, as defined in section 347, subsection (a).

Note: Authority cited: Sections 148.7 and 148.8, Labor Code. Reference: Sections 148.7 and 6603, Labor Code; and Section 11475, Government Code.

350.4. Self-Executing Order.

The Appeals Board may issue self-executing orders as a means of facilitating the processing of orders. A self-executing order shall contain the following conditions:

- (a) A date certain for the intended recipients to object to the order. If a party timely objects to the order by the date specified in the order, the order shall become void;
- (b) That the case will be set for further proceeding upon receipt of a timely objection; and
- (c) If there is no timely objection to the self-executing order, then the order shall be final without further Appeals Board action.

Note: Authority cited: Sections 148.7 and 148.8, Labor Code. Reference: Sections 148.7 and 6603, Labor Code.

352. Ex Parte Communication.

(a) Except as provided in subsection (b), a ~~person~~ party, intervenor, obligor, and their representatives shall not communicate with Appeals Board Members or Administrative Law Judges of the Appeals Board regarding a proceeding.

(b) The following communications are permitted:

(1) Written communications, if copies of them ~~document(s)~~ are contemporaneously served by the communicator on all parties, intervenors, obligors, and their representatives to a proceeding in accordance with Sections ~~355(e) and 355(e)~~; 355.3 and 355.4;

(2) Oral communications, if advance notice of ~~them~~ the communication(s) is given by the communicator to all parties, intervenors, obligors, and their representatives to a proceeding and adequate opportunity is afforded to all ~~parties~~ such persons to participate in the communication;

~~(3) Oral or written requests for information related solely to the procedure of the Appeals Board or status of a proceeding;~~

~~(4)~~ (3) Oral or written communications which all ~~the parties, intervenors, obligors, and their representatives~~ to a proceeding have agreed may be made on an ex parte basis;

~~(5)~~ (4) Oral or written communications proposing settlement, or an agreement for disposition of any or all issues in a proceeding; and

~~(6)~~ (5) Oral or written communications concerning a proceeding, if made more than 30 days after service by the Appeals Board of a final order or decision in that proceeding.

(c) If an ex parte communication not within the exceptions allowed in subsection (b) is received by the Administrative Law Judge, the Administrative Law Judge who received the communication shall, as soon as practicable after receipt, inform all parties of the communication by providing the writing to all other parties or, if the communication is not in writing, providing either a written or verbal summary to all parties.

(d) An oral or written request for information related solely to the procedure of the Appeals Board or the status or schedule of a proceeding are not ex parte communications.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, ~~and~~ 149.5, and 6603, Labor Code.

354. Party Status.

- (a) The Division is a party to all proceedings before the Appeals Board, whether or not the Division has appeared or participated in a proceeding.
- (b) An affected employee or authorized representative of an affected employee shall be made a party to a proceeding upon motion made in accordance with Section 371. When more than one affected employee or more than one authorized employee representative qualify for party status in a proceeding, each may be granted party status in accordance with Section 350.1. A motion for party status shall be heard by the Administrative Law Judge within 30 days of filing.
- (c) The rights of an affected employee shall not be lost by reason of that person's death. In the event of the death of an affected employee, a motion to participate as a party may be brought, in accordance with Section 371, by the affected employee's survivor. An affected employee's survivor is, in order of priority, the surviving spouse or surviving domestic partner, surviving issue, a surviving dependent, or a surviving parent.
- (d) Affected employees or authorized representatives of affected employees shall not participate as parties to employers' cost recovery proceedings pursuant to Section 149.5 of the Labor Code.
- (e) When an Employee Appeal is filed alleging the unreasonableness of the period allowed by the Division to abate an alleged violation, the employer charged with the responsibility of abating the violation is a party to the proceeding.
- (f) An obligor may move to participate as a party to a proceeding by filing a motion in accordance with Section 371.
- (g) When an obligor appeal is filed from actions taken by the Division, the employer charged may move to participate as a party at any time prior to the beginning of a hearing.
- (h) An obligor shall not participate as a party to employers' cost recovery proceedings pursuant to Section 149.5 of the Labor Code.
- (i) A person whose motion for party status has been granted by the Appeals Board becomes a party to the proceeding and is entitled to service of all documents and notices. Each party shall serve, within 10 working days of the order granting party status, copies of all documents previously filed with the Appeals Board and not served on the new party. Service shall be in a manner as prescribed in Section 355~~(e)~~.3 and proof of such service meeting the requirements of Section 355~~(e)~~.3 shall be filed with the Appeals Board.

Note: Authority cited: Sections 148.7 and 6603(a), Labor Code. Reference: Sections 148.7, 6319(b), 6600 and 6603(a), Labor Code.

355. Proper Method of Service & Official Address of Record.

- (a) ~~The Appeals Board shall maintain in each proceeding an official address record which shall contain the names and addresses of all parties and intervenors and their representatives. Documents sent by the Appeals Board to the official address of record for the employer that are returned or undeliverable may result in dismissal of the appeal if the Appeals Board is unable to effectively communicate with the employer.~~
- (b) ~~Any change or substitution in the name and address of any party or intervenor, or its representative, must be communicated, in writing, promptly, and in no case more than 30 days after the change, to the Appeals Board's Sacramento office. The written communication must also be served on all parties and intervenors. Failure to communicate changes or substitutions promptly in writing by the employer may result in dismissal of the appeal if the Appeals Board is unable to effectively communicate with the employer.~~
- (c) ~~Service on a party or intervenor who has appeared through a representative shall be made upon such representative.~~
- (d) ~~Unless otherwise required, service may be made by personal delivery or by depositing the document in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, sealed, properly addressed, with first class postage prepaid, by deposit with a carrier guaranteeing overnight delivery, or by facsimile ("FAX") machine, as provided in subsections (i) and (j) below.~~
- (e) ~~Service is complete at the time of personal delivery or mailing.~~
- (f) ~~Proof of service shall be filed with the document and may be made by any of the following means:~~
- ~~(1) Affidavit or declaration of service by personal delivery, mail, overnight courier or FAX;~~
 - ~~(2) Written statement endorsed upon the document served and signed by the party making the statement; or~~
 - ~~(3) Letter of transmittal.~~
- (g) ~~Proof of service by the Appeals Board may be made by endorsement on the document served, setting forth the fact of service on the persons listed on the official address record on the date of service. The endorsement shall state whether such service was made personally, by mail, overnight courier or FAX, the date of service and the signature of the person making the service.~~
- (h) ~~Where service is made by the posting of a document, citation, notice, order or decision, proof or certification of such posting shall be filed with the issuing office of the Division not later than the second working day following the posting.~~
- (i) ~~The Appeals Board may serve documents on parties and parties may file documents with the Appeals Board and serve them on other parties by means of FAX under the following conditions:~~
- ~~(1) The length of the document to be filed and/or served shall be no more than twelve (12) pages including cover page and attachments;~~
 - ~~(2) A cover sheet shall be attached containing the number of pages transmitted, the FAX number of the sender, the sender's telephone number, and the name of a contact person;~~
 - ~~(3) If a document is filed by FAX, all parties shall be served in the same manner or by guaranteed overnight delivery. The FAX transmission shall include a proof of service indicating the method of service on each party.~~
- (j) ~~A document is considered received on the following working day if transmission begins later than 5:00 p.m. Pacific Time.~~

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6610, Labor Code.

355.1. Official Address Record.

- (a) The Appeals Board shall maintain in each proceeding an official address record, which shall contain the following information provided by each party, intervenor, and obligor:
- (1) The name, postal address, and email address, if any, of each party, intervenor, or obligor;
 - (2) The name, postal address, and email address, if any, of each party, intervenor, or obligor's representative; and
 - (3) An election by each party, intervenor, and obligor of the method of service each party, intervenor, obligor, or representative shall receive from the Appeals Board pursuant to Section 355.2, subsection (a).
- (b) Any change or substitution in the name, postal address, or email address of any party, intervenor, obligor, or its representative must be communicated to the Appeals Board in Sacramento in writing as soon as practicable after the change is known, but in no case more than 30 days after the change is known to the party, intervenor, obligor, or its representative. The written communication must also be served on all other parties, intervenors, obligors, and their representatives.
- (c) Failure to communicate changes or substitutions promptly in writing by the employer may result in dismissal of the appeal, or loss of party or intervenor status, if the Appeals Board is unable to effectively communicate with the employer, party, or intervenor.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6610, Labor Code.

355.2. Proper Method of Service by Appeals Board.

(a) Parties, intervenors, obligors, and their representatives shall elect postal mail or email as their preferred method of service, but not both, for documents served on them by the Appeals Board. If a party does not disclose an email address in the Official Address Record, service shall be by postal mail.

(1) Notwithstanding subsection (a), when a hearing or conference occurs in which the parties, intervenors, obligors, or their representatives appear in person, the Administrative Law Judge conducting the hearing or conference may elect to personally serve Appeals Board documents at that time, if practicable.

(b) Service by the Appeals Board on a party, intervenor, or obligor who has appeared through a representative shall be made upon the representative in addition to the party, intervenor, or obligor being represented.

(c) Service is complete at the time of personal delivery or mailing. Absent evidence to the contrary, service by email shall be deemed complete at the time of transmission, unless a document is re-served in accordance with subsection (e).

(d) Proof of service by the Appeals Board may be made by:

(1) Endorsement on the document served, setting forth the fact of service on the persons listed on the official address record and the date of service. The endorsement shall state whether such service was made by postal mail, email, personally, or by overnight courier, the date of service and the signature of the person making the service;

(2) Affidavit or declaration of service by personal delivery, postal mail, or email;

(3) Letter of transmittal; or

(4) Designating a party, intervenor, obligor, or their representative to perform service on all participants in the official address record and file the proof of service with the Appeals Board documenting that service.

(e) If, after serving a document in accordance with subsection (c), the Appeals Board receives notification that service to one or more parties (or their agents or representatives) failed, the Appeals Board shall promptly re-serve the document on the intended recipient(s) using the method of service (i.e., email, postal service) best calculated to result in valid service on the intended recipient(s), even if the intended recipient(s) did not previously designate that method as their preferred method of service.

(1) The Appeals Board need not re-serve the document on intended recipients for whom the Appeals Board did not receive notification of failed service.

(f) An email address is presumed valid for service until a party notifies the Appeals Board that the email address is no longer valid.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6610, Labor Code.

355.3. Service by Parties, Intervenor, Obligor, and Representatives.

(a) When a party, intervenor, obligor, or representative serves a document on another party, intervenor, obligor, or representative, that service shall occur by first-class postal mail, a carrier defined in subsection (b), or by personal service.

(b) A carrier will satisfy subsection (a) if it provides an alternative method that will effect service that is equivalent to or more expeditious than first-class mail. For purposes of this subsection, “an alternative method that will effect service that is equivalent to or more expeditious than first-class mail” shall be limited to either:

(1) Use of express (overnight) or priority mail; or

(2) Use of a bona fide commercial delivery service or attorney service promising delivery within two business days, as shown on the service’s invoice or receipt.

(c) Service by postal mail is made by depositing the document in a post office, mailbox, or mail chute, or other like facility regularly maintained by the United States Postal Service, sealed, properly addressed, with first-class postage prepaid, or by deposit with a carrier as defined in subsection (b).

(d) Service is complete at the time of personal delivery or mailing.

(e) Proof of service shall be filed with the document and may be made by any of the following means:

(1) Affidavit or declaration of service by personal delivery, mail, or overnight courier; or

(2) Letter of transmittal.

(f) If a party, intervenor, obligor, or their representative responsible for serving the document(s) on another party, intervenor, obligor, or their representative, receives notification that the service to an intended recipient failed, the party responsible for sending the document(s) shall promptly re-serve the document on the intended recipient(s) using the method of service best calculated to result in valid service on the intended recipient(s).

(1) The server need not re-serve the document on intended recipients for whom the server did not receive notification of failed service.

(2) On re-service, the server shall execute a new proof of service in accordance with subsection (e) showing re-service on the intended recipient(s).

(g) By written stipulation of all parties, intervenors, and obligors, service between the parties may be by electronic methods.

(1) Unless otherwise stipulated, subsections (d) and (f) continue to apply to documents and things served between the parties.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5, 6603 and 6610, Labor Code.

355.4. Filing documents with the Appeals Board.

(a) A party, intervenor, obligor, and their representatives shall file documents with the Appeals Board by one of the following methods:

(1) First-class mail;

(2) An alternative method of filing that is equivalent to or more expeditious than first-class mail as defined in Section 355.3;

(3) Personal service; or

(4) Electronic service pursuant to subsection (f).

(b) Any document filed with the Appeals Board must be served on the other parties, intervenors, obligors, and their representatives.

(c) Unless otherwise specified in another section, a document shall be deemed filed with the Appeals Board on the date a document is hand delivered, electronically filed, or the date the document is received by the Appeals Board.

(d) An electronically filed document shall be considered received by the Appeals Board the following working day if transmission begins later than 11:59 p.m. Pacific Time.

(e) Proof of service shall be filed with the document and may be made by any of the following means:

(1) Affidavit or declaration of service by personal delivery, mail, electronic service if stipulated to in accordance with Section 355.3, subsection (g), or courier; or

(2) Letter of transmittal.

(f) Only the following documents may be filed directly into OASIS via the Appeals Board's website. Documents filed pursuant to this subsection shall comply with the requirements of Section 355.5. Documents not listed in this subsection shall be filed pursuant to subsections (a)(1), (2), or (3) of this section:

(1) Appeal information and citation and notification of penalty;

(2) Change to the Official Address Record including change of representative, change of address, or change of email address;

(3) Motion for Change of Venue;

(4) Motion for a Continuance;

(5) Motion for a Discovery Order;

- (6) Motion to Withdraw Appeal;
- (7) Motion to Withdraw Citation;
- (8) Motion to File Late Appeal;
- (9) Motion for Intervenor/Party status;
- (10) Petition for Reconsideration;
- (11) Request of Issuance of Subpoena;
- (12) Motion to Amend Appeal;
- (13) Motion to Amend Citation;
- (14) Request for conference with Appeals Board;
- (15) Request for Hearing Record;
- (16) Briefs;
- (17) Proof of service by party on behalf of Appeals Board as allowed in Section 355.2, subsection (d)(4); and
- (18) Settlement Order and proof of service of Settlement Order.

(g) When filing a document electronically as allowed by subsection (f), the following information shall be provided:

- (1) Document title;
- (2) Date of document being filed;
- (3) Inspection number, or docket number (if one exists);
- (4) Identification of party submitting the document; and
- (5) Identification of the party's representative who is filing the document, if any.

(h) Documents filed in violation of subsections (f) and (g) shall be rejected and shall not be filed in the Appeals Board electronic case file.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5, 6603 and 6610, Labor Code.

355.5. Form and Size Requirements for Documents Filed With the Appeals Board.

(a) All documents filed with the Appeals Board, whether filed in paper or electronically, shall be filed in accordance with the following standards:

(1) Only one side of each page shall be used;

(2) All margins shall be at least one inch and shall be without typed or handwritten text in any margin;

(3) The first page shall include a case caption that shall include the name and address of the employer, the assigned docket number, and the title of the document;

(4) Documents shall be prepared in a font no less than 12 points in size;

(5) No single document shall exceed 25 pages in length without the prior permission of the Appeals Board, a Presiding Administrative Law Judge, or an Administrative Law Judge who is assigned the case;

(6) Documents shall be double-spaced or one-and-one-half-spaced; however, captions, headings, headers, footnotes, footers and block quotations may be single-spaced;

(7) Paper documents shall be flat, without folds and without staples. Non-conforming submissions may be rejected and returned to the submitter; and

(8) No documents shall contain bar codes, unless those bar codes are added after the document is filed as part of the scanning or document processing procedures initiated by the Appeals Board as a requirement of OASIS.

(b) Electronic document filing shall be in accordance with the following standards:

(1) All electronically filed documents shall be submitted in response to prompts and instructions on the Appeals Board's OASIS website;

(2) Any document that may be filed in an electronic form shall be submitted in PDF/A (Portable Document Format);

(3) With the exception of electronic forms and required attachments, no embedded data shall be allowed in electronically filed documents;

(4) The filing party shall take all reasonable steps to ensure that the filing does not contain computer code, including viruses, that might be harmful to OASIS or to other users of OASIS. Any electronically submitted document that is determined to contain a virus or other potentially harmful computer code may not be processed and may be deleted; and

(5) If it is necessary to submit an electronic document allowed by OASIS, the filing party shall verify the readability of the scanned document before submitting it to OASIS.

(c) Documents successfully filed through OASIS will receive a date- and time-stamped confirmation of successful transmission.

(d) Oversized documents and photographs shall be filed only at the time of hearing.

(e) Printed paper documents shall be printed with black ink on white paper that is 8 ½ x 11 inches and at least 20 pound weight.

(f) Parties, intervenors, and obligors who are not represented by legal counsel may file legible hand-written documents; however, those documents must comply with subsections (a)(1), (2), (3), (5), (7), and (8).

(g) The document form requirements in this section apply only to those documents prepared by a party, intervenor, obligor, or their representative, and do not apply to documents submitted as evidence at a hearing.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 6603, Labor Code.

356. Notice to Employees of Appeal and Hearing.

(a) The employer shall give notice of an appeal to its employees by posting the docketed Appeal ~~Form~~, Participation Notice, and Notice of Hearing at or near the site of the alleged violation, positioned so as to be easily read by employees working in the area. If it is not practicable to post the document at or near the site of the alleged violation, the document may be posted in a conspicuous place where it will be readily observable by employees, or at a location to which employees report each day, or at a location from which employees operate to carry out their duties. The docketed Appeal ~~Form~~, Participation Notice, and Notice of Hearing shall be posted immediately upon receipt from the Appeals Board and shall remain posted until the date of the hearing or receipt of an order disposing of the appeal.

(b) In addition to posting as required in subsection (a), Sservice of the docketed Appeal ~~Form~~, Participation Notice, and Notice of Hearing is required, ~~in addition to posting,~~ under the following circumstances:

- (1) If affected employees are represented by an authorized employee representative, service in a manner prescribed in Section 355~~(e)~~.3 shall be made upon the representative.
- (2) If an employee sustained a serious injury or illness, or was killed, as a result of an alleged violation that is being appealed, service in the manner prescribed in Section 355~~(e)~~.3 shall be made upon the employee or the representative of the deceased employee.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 6603(a), Labor Code.

356.1. Form of Participation Notice.

(a) The Participation Notice required by Section 356 shall be in the following form:

“Your employer, (name of employer), has been cited by the California Division of Occupational Safety and Health for violation of an Occupational Safety and Health standard. The citation and/or civil penalty has been contested and will be the subject of a hearing before the Occupational Safety and Health Appeals Board. Affected employees are entitled to participate in this hearing as parties under terms and conditions established by the Occupational Safety and Health Appeals Board in its rules of practice and procedure by filing a motion for party status. The motion for party status shall be ~~sent to~~ filed with the Occupational Safety and Health Appeals Board in accordance with Section 355.4, at the Appeals Board's principal office in Sacramento, California, and shall be accompanied by a proof of service and shall indicate that it was served on the Division and Employer and any other parties, as provided in Section 355.3.

“All papers filed relative to this matter may be inspected at: (A place reasonably convenient to employees, preferably at or near work place.)”

Where appropriate, the second sentence of the above notice will be deleted and the following sentence will be substituted:

“The reasonableness of the period prescribed by the Division of Occupational Safety and Health for abatement of the violation has been contested and will be the subject of a hearing before the Occupational Safety and Health Appeals Board.”

(b) For a special order or an order to take special action, the first two sentences of the above notice will be deleted and the following sentences will be substituted:

“Your employer, (name of employer), has been issued an order by the California Division of Occupational Safety and Health. The order has been contested and will be the subject of a hearing before the Occupational Safety and Health Appeals Board.”

(c) An employer shall file with the issuing office of the Division, not later than the second working day following the service or posting, proof or certification of service or posting of the docketed Appeal and Participation Notice.

(d) This section and Section 356 do not apply to appeals from citations issued pursuant to Section 2950 of the Health and Safety Code.

NOTE: Authority cited: Sections 148.7 and 6603(a), Labor Code. Reference: Sections 148.7, 6602 and 6603(a), Labor Code.

356.2. Responsibility of Employee to Notify Employer and Other Employees of Proceeding.

(a) When an Employee Appeal is filed by an employee, a copy of the docketed Employee Appeal shall be forwarded by the Appeals Board to the employer.

(b) The employer shall post both a copy of the docketed Employee Appeal and a copy of the Participation Notice. Posting shall be in a manner as prescribed in Section 356, subsection (a). The form of the ~~p~~Participation ~~n~~Notice shall follow the format of ~~s~~Section 356.1.

(c) When an Employee Appeal is filed by an employee and there are other employees who are represented by an authorized employee representative, the employee shall, upon receipt of the docketed Employee Appeal and the statement by the Division required by Section 361~~(e)~~.1, subsection (d) relating to the reasonableness of the abatement period, serve a copy of the Employee Appeal, the Participation Notice, and the statement on the authorized employee representative. Service shall be in a manner as prescribed in Section 355~~(e)~~.3 and proof of such service meeting the requirements of Section 355~~(e)~~.3 shall be filed with the Appeals Board.

(d) An authorized employee representative who files an Employee Appeal shall serve a copy of the docketed Employee Appeal upon any other authorized employee representative whose members are affected employees.

(e) Where posting is required by this rule, such posting shall be maintained until the commencement of the hearing or until earlier disposition of the proceeding.

NOTE: Authority cited: Sections 148.7 and 6603(a), Labor Code. Reference: Sections 148.7 and 6603(a), Labor Code.

359. Filing an Intent to Appeal and Late Appeals of Appeal.

- (a) Except as provided in Section 361.1, subsection (b), an appeal shall be deemed filed on the date the Appeals Board is notified of an intent to file an appeal. ~~a communication indicating a desire to appeal the Division action is hand delivered, mailed to, or received by the Appeals Board in Sacramento, California, whichever is earlier. No particular format is necessary to institute the appeal.~~
- (b) An intent to file an appeal may be made by telephone, in writing or in person delivered to the Appeals Board's main office, or online via the OASIS system. The Board shall also make available an optional paper appeal form, downloadable from its website, that may be used to demonstrate intent. The optional form may be mailed or delivered to the Appeals Board's main office.
- (c) A ~~C~~ommunications to the Division of Occupational Safety & Health indicating ~~a desire an intent to appeal is not an intent to file an appeal.~~ are not deemed filed with the Appeals Board and do not initiate the appeal.
- (d) An appeal is timely if the intent to appeal is mailed to or received by the Appeals Board within 15 working days of the date the citation is received by the cited employer. ~~(b)~~ The time for filing any appeal may be extended or a late filing permitted upon a written showing of good cause that contains sufficient facts to show or establish a reasonable basis for the late filing.
- ~~(e)~~(e) A request to file a late appeal shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant.
- (f) The current address and phone number of the Appeals Board's main office shall be stated on the citation(s) and posted on the Appeals Board's website.
- (g) The Board may find good cause for a late appeal exists where:
- (1) A settlement has been reached between the parties within 3 months of issuance of a citation; and
 - (2) The appellant is able to demonstrate that settlement was actively pursued by the parties during the period prior to filing of the late appeal.
- (h) The parties may submit a stipulation to demonstrate that the requirements of subsections (g)(1) and (g)(2) have been met.
- (i) Negotiations that do not result in an executed settlement agreement are not good cause for a late appeal under subsection (g). As stated in subsection (d), an employer must contact the Appeals Board within 15 working days of receipt of a citation to preserve its right of appeal.
- (j) The Board may find good cause exists for a late appeal on the issue of abatement where:

(1) The employer submitted proof of abatement to the Division timely as required in the citation; and

(2) The Division does not accept the proof of abatement; or

(3) The Division fails to modify the penalty as required following submittal of proof of adequate abatement.

(k) Acceptance of a late appeal under subsection (j) does not appeal any other portion of the citation or notification of penalty.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, ~~and~~ 6601, and 6603, Labor Code.

359.1. Perfecting an Appeal Form.

(a) An appeal is perfected and may be docketed if it is timely, as required by Section 359, and all required information is submitted to the Appeals Board in accordance with this section.
~~completed appeal form shall be filed for each contested Division action.~~

(b) ~~If an appeal is initiated by other than an appeal form, a completed appeal form shall be filed with the Appeals Board within 10 days of the Appeals Board's written acknowledgement by the Appeals Board of the desire to appeal~~ telephone, in writing, or by online form, but is incomplete, the additional information required shall be submitted by mail, hand delivery, or online via the OASIS system accessible through the Board's website. Failure to submit copies of all citations being appealed, contact information as required in Section 355.1, and the information required by Section 361.3, file a completed appeal form with the Appeals Board within 10 20 days of written or electronic acknowledgement by the Board of the receipt of an intent to appeal constitutes grounds for dismissal.

(c) The Appeals Board shall furnish optional appeal forms upon request and shall provide them to the district offices of the Division.

(d) After required information and documents are submitted either on paper or online via the OASIS system, and confirmed to be complete, the appeal will be docketed.

~~(d) Upon receipt of a timely completed appeal form, the Appeals Board shall assign a docket number and deliver or mail a copy of the docketed appeal to each party.~~

(e) Upon docketing of an appeal, the Appeals Board shall serve on each party the appeal information, copies of documents required to perfect the appeal, and the docket number(s) assigned to the appeal.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 6600, 6601 and 6603, Labor Code.

361.3. Issues on Appeal.

The issues on appeal shall be limited to those arising out of the facts set forth in the Division action, that is contested by a docketed appeal, subject to the following limitations: and the grounds set forth in the appeal.

(a) If the Division action appealed from is a citation, the employer ~~must~~shall specify ~~on the appeal form which one or more of the following issues it is raising in~~ components of the Division citation it is challenging in its appeal, as well as any affirmative defenses as described in subsection (b);:

- (1) The existence of the violation alleged in the underlying citation;
- (2) The classification of the violation;
- (3) The abatement period;
- (4) The reasonableness of the changes required by the Division to abate the violation; ~~or~~
- (5) ~~Only~~ The reasonableness of the proposed penalty;

(b) Affirmative defenses.

(1) An affirmative defense is a justification or excuse that, if proved by appellant, relieves the cited employer of all or some of the responsibility for the alleged violation. An affirmative defense must be timely raised by appellant. Examples of affirmative defenses that may be raised by the appellant include, but are not limited to:

(A) Independent employee action caused the violation.

(B) A different safety order applied to the work activity that is the subject of the citation, and appellant was in compliance with that other safety order. The different safety order should be identified.

(C) An exception exists in the California Code of Regulations, Title 8, which allows for the action that is the subject of the citation. The specific safety order containing the exception should be identified.

(D) The inspection that gave rise to the citation was invalid because the Division employee who inspected appellant's worksite failed to comply with laws governing administrative searches.

(E) Another affirmative defense. Other affirmative defenses may exist and can be asserted by the employer.

(2) If the appellant contends one or more affirmative defense(s) exist(s), the appellant may, but is not required to, provide a short, plain statement in writing setting forth the facts or circumstances which, if true, would prove the affirmative defense.

~~(c)~~ If the appeal contests only the reasonableness of the proposed penalty, the issues on appeal shall be limited to the classification of the violation and the reasonableness of the proposed penalty, ~~unless a timely motion pursuant to Section 371 is granted to amend the appeal to contest the existence of the violation, the abatement period, or the reasonableness of the changes required by the Division to abate the violation.~~

(d) Amendments to the citation and the appeal may be made by parties in accordance with Section 371.2.

~~(b)~~(e) If a citation is classified as a repeat violation pursuant to Section 334, subsection (d), the earlier citation established by failure to appeal or the entry of a final disposition by the Appeals Board shall not be in issue and shall not be a docketed appeal.

~~(e)~~(f) If an employer files a timely appeal from a notification of failure to abate but did not file an appeal from the underlying citation, the existence of the alleged violation shall be an issue in the same hearing if the employer files a motion, in accordance with Section 371, demonstrating good cause for having not appealed the underlying citation.

~~(d)~~(g) If the Division amends a citation for the sole purpose of granting or revoking an abatement credit, the employer may appeal the grant or revocation within 15 working days from receipt of the amended citation. The amendment shall not give the Appeals Board jurisdiction over any other issue.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 6317, 6319.5, ~~and 6601~~, and 6603, Labor Code.

364.2. Disposition of Appeal Settlement Order.

~~(a) Upon a showing of good cause, the Appeals Board may dispose of the issues on appeal by granting a written motion of the parties made at any time or an oral motion of the parties made on the hearing record or in the prehearing conference.~~

(a) The Appeals Board may dispose of an appeal by issuing a Settlement Order, bearing the signature of the Division and the employer or obligor, at any time after the Appeals Board obtains jurisdiction of the appeal. The Division and employer, having agreed to resolution of the issues on appeal, shall submit the terms of the settlement agreement to the Appeals Board for approval with this section. Upon determination of compliance with this section, the Board shall issue a Notice of Acceptance of Settlement Order on all parties listed in the Official Address Record.

(b) A Settlement Order shall contain the following items in addition to the signature(s) of all parties:

(1) Employer name;

(2) Employer address;

(3) Docket number(s);

(4) Citation and item number(s) appealed;

(5) Final penalty amounts for each citation and item number on appeal;

(6) Payment due date(s); and

(7) The following paragraph: "This Settlement Order is a final Order of the Appeals Board and is effective 30 days from the date the Appeals Board issues a Notice of Acceptance of Settlement Order served on all parties, unless a petition for reconsideration is filed with the Appeals Board within those 30 days."

(c) Full settlements of all appealed matters associated with a specific inspection number may be concluded and resolved by the parties by entering into a Settlement Order as described in subsection (a) or by Order of the Appeals Board. Partial settlements may be entered into by stipulation of the parties and are effective when approved by the assigned Administrative Law Judge.

(bd) The Division shall serve a copy of the ~~disposition~~ Settlement Order on any authorized employee representative if known to the Division to represent affected employees. Service shall be in a manner as prescribed in Section 355(e).3 and proof of such service meeting the requirements of Section 355(e).3 shall be filed with the Appeals Board.

~~(e) The Appeals Board shall grant such disposition by order or decision served on the parties.~~

~~(de) The employer shall post for 1530 working days a copy of the order or decision and a copy of~~

the ~~disposition~~ Settlement Order. Posting shall be in a manner as prescribed in Section 356, subsection (a).

(f) Within 30 days of the date of the Notice of Acceptance of Settlement Order, any party, intervenor, or obligor aggrieved may file a petition for reconsideration of the Settlement Order on the basis of fraud, misrepresentation, mutual mistake of fact, or undue influence in the formation of the Settlement Order, or the Board may order reconsideration on its own motion consistent with Section 390.2. If no petition for reconsideration is timely filed, the Settlement Order is a final order of the Appeals Board.

~~(e) An appeal hearing will be taken off calendar if a disposition is received by the Appeals Board's Sacramento office before 10:00 a.m. on the working day preceding the first day of the hearing. If the terms of the disposition are given orally, confirmation by both the employer and the Division is required. The Appeals Board may allow up to 30 days for submission in writing of such oral dispositions.~~

Note: The Appeals Board will make available an optional form for containing the items described in subsections (b)(1) through (b)(7).

NOTE: Authority cited: Sections 148.7 and 6603(a), Labor Code. Reference: Sections 148.7 and 6614, Labor Code.

371. Prehearing Motions.

(a) Any motion or request for action, any opposition thereto, and any reply relating to any proceeding shall be in writing and directed to the Appeals Board. The caption of each motion or request shall contain the title and docket or petition number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefor.

(b) Any motion or request, any opposition thereto, and any reply shall be signed by the party filing or by the party's representative, and a copy shall be served on all parties. Service shall be in a manner as prescribed in Section 355~~(d)~~.3 and proof of such service meeting the requirements of Section 355~~(f)~~.3 shall be filed with the Appeals Board.

(c) Unless otherwise ordered, the following dates shall apply to prehearing motions or requests:

(1) A motion or request shall be served and filed no later than 20 days before the hearing date.

(2) Any opposition to the motion shall be served and filed no later than 10 days from service of the motion or request.

(3) Any reply papers shall be served and filed no later than 5 days before the hearing date.

(d) A request to file a motion, opposition, or reply later than the times specified in (c) shall be granted if accompanied by a declaration showing good cause for the late filing.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, ~~and~~ 149.5, and 6603, Labor Code.

371.1. Motions Concerning Hearing Dates.

(a) Continuances are disfavored.

(b) A motion for a continuance shall be in writing and made promptly once the reason necessitating the continuance is ascertained. The motion shall be ~~directed to~~ filed with the Appeals Board as required in Section 355.4. Service shall be in a manner as prescribed in Section 355~~(d)~~.3 and proof of such service meeting the requirements of Section 355~~(d)~~.3 shall be filed with the Appeals Board. In the case of an emergency where the time for the hearing does not permit service as set forth above, service may be made upon a party by fax, email, or personal service. Motions to the Board, however, may not be made by email. The motion shall contain:

(1) The date(s) presently assigned for hearing and the date(s) to which continuance is sought;

(2) A declaration signed under penalty of perjury containing facts in support of the motion; and

(3) An indication of whether the other parties to the appeal were contacted, and if so, their position on the motion. Absent exigent circumstances, the Appeals Board will not rule on the motion without notification of the other party's position or until the time to oppose the motion as provided in (c) has run, whichever comes first.

(c) Any opposition to a motion for continuance shall be filed with the Appeals Board immediately but no later than ten (10) days from service of the motion. Service shall be in a manner as prescribed in Section 355~~(d)~~.3 and proof of such service meeting the requirements of Section 355~~(d)~~.3 shall be filed with the Appeals Board.

(d) The motion shall be ruled on promptly and not delayed once the Board has received all information needed to rule on the motion.

(e) Each request for a continuance shall be considered on its own merits. The motion shall be granted on an affirmative showing of good cause. The following circumstances shall be considered when determining whether good cause exists for the granting of the continuance:

(1) The unavailability of an essential witness, party, counsel or representative because an emergency arises, including, but not limited to, death or incapacitating illness.

(2) The addition of a new party who has not had notice of the hearing date and an adequate opportunity to prepare for the hearing.

(3) The age of the case and whether there were any previous continuances.

(4) The ability of the parties to agree on at least three (3) alternative hearing dates in the immediate future and the Appeals Board's ability to calendar the case on one of the dates.

(5) The prejudice that parties or witnesses will suffer as a result of the continuance being granted or denied.

(6) Whether the party's counsel is calendared in another hearing which conflicts with the Appeals Board's scheduled hearing, including administrative, civil or criminal matters, the specific attempts made by counsel to continue the other matter, and the results of such attempts.

(7) Whether an alternative short of continuing the entire hearing, such as leaving the record open to allow testimony of an unavailable witness or witnesses at a later time, would accommodate the needs of the moving party while allowing the matter to proceed in the meantime.

(8) Whether the employer has abated the alleged unsafe condition or conditions.

(9) The status of any related criminal investigations or proceedings.

(10) Whether the conflict necessitating the continuance was either foreseeable or created by the party(ies) or the party(ies) representative(s).

(11) Any other fact or circumstance relevant to the fair determination of the motion.

(f) The following circumstances shall not constitute good cause:

(1) Failure to obtain representation, unless a substitution is required through no fault of the party.

(2) Failure of another party to comply with a request for discovery, unless the Appeals Board orders a continuance of the hearing after a motion to compel discovery has been filed pursuant to Section 372.6. A continuance of the hearing may be ordered only if:

(A) a motion to compel discovery was filed at a time which would not have foreseeably delayed the hearing, or good cause for such later filing is shown, and

(B) the matters sought to be discovered are of sufficient importance to warrant a continuance of the hearing.

Note: At-hearing sanctions for discovery abuses are specified in Section 372.7 of these regulations.

(g) Once a motion for continuance has been ruled on by the Appeals Board, a motion for continuance based on the same grounds shall not be entertained at the hearing. If the motion was denied without prejudice a party may renew the motion and submit additional information supporting the request including, but not limited to, changed circumstances or new information not formerly available.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, ~~and~~ 149.5; and
6603, Labor Code.

371.2. Amendments.

(a) Amendment of a citation or appeal is permitted in the following circumstances so long as any party opposing the amendment has an opportunity to demonstrate any prejudice that the requested amendment will create. In determining whether prejudice is shown by a party opposing an amendment, consideration shall be given to the specific evidence that the opponent of the amendment would be unable to present because of the timing of the request, if the amendment were granted.

(1) A request for an amendment that does not cause prejudice to any party may be made by a party or the Appeals Board at any time.

(2) A request for an amendment that causes prejudice to the opposing party shall be granted if one of the following circumstances apply:

(A) In the case of a request filed and served at least 20 days before the hearing:

(i) The amended citation or appeal arises out of the same general set of facts as the original citation or appeal such that the amended citation or appeal relates back to the original citation or appeal; and

(ii) The request for the amendment is in writing and directed to the Appeals Board; and

(iii) The request is filed and served pursuant to ~~s~~Sections 355.3 and 355.4; and

(iv) The party opposing the amendment is provided ten days from the date of service of the request to file and serve written opposition pursuant to ~~s~~Sections 355.3 and 355.4.

(B) In the case of a request brought less than 20 days before the hearing or during a hearing:

(i) The amended citation or appeal arises out of the same general set of facts as the original citation or appeal such that the amended citation or appeal relates back to the original citation or appeal; and

(ii) The party seeking the amendment shows good cause for the failure to bring such request at least 20 days before the hearing; and

(iii) Any prejudice created by granting such amendment can be remedied by a continuance or other order of the ~~a~~Administrative Law Judge.

(b) Amendment of a citation or an appeal is not permitted when:

(1) The amendment concerns a general set of facts sufficiently different from the facts contained in the citation or appeal that the proposed amendment does not relate back to the original citation or appeal; and

(2) The violation alleged in the original citation occurred more than six months prior to the date of the request to amend the citation.

Note: Authority cited: Section 148.7, Labor Code. Reference: Section 11507, Government Code; and Sections 6317 and 6603(a), Labor Code.

372.6. Proceeding to Compel Discovery.

(a) A party, intervenor, or obligor claiming that its request for discovery pursuant to Sections 372 and 372.1 has not been complied with may serve and file with the Administrative Law Judge or the Appeals Board, if the Appeals Board is hearing the case, a motion to compel discovery naming as respondent the party refusing to comply. The motion shall comply with Section 11507.7 of the Government Code and shall state:

- (1) Facts showing that respondent refused or failed to comply with Section 372 or Section 372.1;
- (2) A description of the matters sought to be discovered;
- (3) The reason or reasons why such matter is discoverable under these rules; and
- (4) A reasonable and good faith attempt to contact the respondent for an informal resolution of the issue has been made; and
- (5) The ground or grounds of respondent's refusal so far as known.

(b) The motion to compel discovery shall be served upon respondent and filed within 15 days after respondent first evidenced a refusal or failure to comply with Sections 372 and 372.1, or within 30 days after the discovery request was made and respondent has failed to reply to the request or within another time stipulated by the parties with the approval of the Administrative Law Judge or the Appeals Board, whichever period is longer. The motion shall comply with Section 371, subsections (a) and (b).

(c) The hearing on the motion to compel discovery shall be held within 15 days after the motion is made, or a later time that the Administrative Law Judge or the Appeals Board may, on its own motion for good cause determine. Respondent shall have the right to serve and file a written answer or other response to the motion before or at the time of hearing. The answer must comply with Section 371, subsections (a) and (b). The hearing may be conducted by telephone or other electronic means as provided in Government Code Section 11140.30. The parties may stipulate, with the approval of the Administrative Law Judge or the Appeals Board, to waive a hearing on the motion to compel discovery, provided that the stipulation provides a date by which respondent shall file its response and requires that the order on the motion shall issue within 30 days of the date the motion was filed.

(d) Where the matter sought to be discovered is under the custody or control of respondent and respondent asserts that the matter is not a discoverable matter under the provisions of Section 372.1, subsections (a) through (d), or is privileged against disclosure under subsection (f), the Administrative Law Judge or the Appeals Board may order that the matter be lodged with it and examined in accordance with the provisions of Subdivision (b) of Section 915 of the Evidence Code. The Administrative Law Judge or the Appeals Board shall decide the motion based upon

the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the Administrative Law Judge or the Appeals Board may allow.

(e) Unless otherwise stipulated by the parties with the approval of the Administrative Law Judge or the Appeals Board, the Administrative Law Judge or the Appeals Board shall, no later than 15 days after the hearing, issue a written order denying or granting the motion. The Administrative Law Judge or the Appeals Board shall promptly serve a copy of the order to each party or representative. Where the order grants the motion, in whole or in part, the order shall set forth the matters the moving party is entitled to discover under Sections 372 and 372.1. The order shall not become effective until 10 days after the date the order is served. Where the order denies the motion in its entirety, the order shall be effective on the date it is served.

NOTE: Authority cited: Sections 148.7, 149.5 and 6603(a), Labor Code. Reference: Section 11507.7, Government Code; and Sections 148.7, 149.5 and 6603(a), Labor Code.

372.8. Discovery; exclusive provisions.

The provisions of Sections 372, 372.1, 372.2, 372.3, and 372.9 provide the exclusive right to and method of discovery as to any proceeding within the jurisdiction of the Appeals Board.

NOTE: Authority cited: Sections 148.7, 149.5 and 6603(a), Labor Code. Reference: Sections 148.7, 149.5 and 6603(a), Labor Code.

372.9. Division Production of Evidence at Filing of Appeal.

Within 30 days of receipt of service of the documents as described in Section 355.3, the Division shall provide the employer with copies of all documents and evidence within its possession that is related to the employer's appeal, including reproductions of photographs, videotapes or other media. The Division will update the employer with any newly discovered, relevant material, on an ongoing basis throughout the duration of employer's appeal. Attorney-client, work product, and other privileged information is not subject to disclosure by the Division. The Presiding Administrative Law Judge or Administrative Law Judge assigned to prehearing proceedings may be contacted by the parties, and shall act on any claim or dispute related to confidentiality or privilege.

NOTE: Authority cited: Sections 148.7, 149.5 and 6603(a), Labor Code. Reference: Sections 148.7, 149.5 and 6603(a), Labor Code.

376.1. Conduct of Hearing.

- (a) Testimony shall be taken only on oath, affirmation, or penalty of perjury.
- (b) Each party shall have these rights: To call and examine witnesses; to introduce exhibits; to question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations; to impeach any witness regardless of which party first called the witness to testify; and to rebut any opposing evidence. If a party does not testify on his or her behalf, the party may be called and examined as if under cross-examination.
- (c) The Appeals Board may call and examine a party or witness and may, on its own motion, admit any relevant and material evidence.
- (d) The taking of evidence in a hearing shall be controlled by the Appeals Board in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the Appeals Board shall define the issues and explain the order in which evidence will be received.
- (e) Once a hearing has commenced and until a decision is issued, all motions or questions regarding the proceeding shall be referred to the assigned Administrative Law Judge. If written, the motion shall be served in a manner as prescribed in Sections 355~~(d)~~.3 and 355.4 and proof of service meeting the requirements of those sections ~~Section 355(f)~~ shall be filed with the Appeals Board. An opposing party may respond in the manner and within such time as the Administrative Law Judge may direct.
- (f) Continuance requests shall be entertained at the hearing only in cases of: (1) unforeseen emergencies, including, but not limited to, death or illness of a party, witness, or representative, or (2) non-appearance of a subpoenaed witness whose testimony is material to the outcome of the proceeding or (3) good cause.

Note: Authority cited: Sections 148.7 and 6603(a), Labor Code. Reference: Section 11513, Government Code; and Sections 148.7, 149.5 and 6603(a), Labor Code.

376.4. Return of Exhibit.

(a) During the pendency of any proceeding, ~~no~~ an exhibit filed or received in evidence shall ~~may~~ be released into the custody of a party or representative ~~except~~ upon stipulation of all parties or upon order of the Appeals Board or the Administrative Law Judge conducting the hearing.

(b) ~~At any time after a proceeding becomes final, the Appeals Board may, upon request or on its own motion, with or without notice, return to the owner or proponent, all exhibits of a physical, mechanical, or demonstrative character, unless the parties stipulate to some other disposition. The owner or proponent shall bear the cost of return of the exhibit. The following types of exhibits shall be released to a party by stipulation or order for safe-keeping until the legal process results in a final determination:~~

(1) Oversized documents that cannot be scanned into an electronic case file;

(2) Demonstrative evidence that cannot be scanned into an electronic case file;

(3) Any other evidence that has been accepted as evidence, and that the Administrative Law Judge holding the hearing, or the Appeals Board, determines is inappropriate for repository in an electronic case file.

(c) If the parties, intervenors, obligors, or their representatives stipulate, and the Administrative Law Judge conducting the hearing concurs, a photograph of evidence unsuitable for scanning into an electronic case file may be substituted for the actual exhibit. The photograph may then be scanned into the electronic case file with the other exhibits in place of the actual exhibit.

(d) At any time after a proceeding becomes final, the Appeals Board may, upon request or upon its own motion, issue an order releasing an exhibit that is held for safe-keeping by a party.

NOTE: Authority cited: Sections 148.7 and 149.5, Labor Code. Reference: Sections 148.7 and 149.5, Labor Code.

376.7 Hearing Record: Recording.

~~The Appeals Board shall make the official record for hearings. The record shall be made by means of an electronic device or by a court reporter. A party desiring the presence of a court reporter must make its own arrangements.~~

(a) The official recording for hearings shall be made by one of the following methods:

(1) By the Appeals Board by means of an electronic device; or

(2) By a certified court reporter.

(b) A party desiring the presence of a court reporter must arrange for the presence of a certified court reporter to record the entire hearing. The court reporter's transcript of the hearing may be designated as the official recording of the hearing. A copy of the transcript of the entire hearing shall be provided to the Appeals Board at no cost to the Appeals Board whether or not the hearing participants request that the hearing be transcribed. Any costs associated with the use of a court reporter shall be paid by the party requesting the court reporter or other arrangement by stipulation among all of the parties, intervenors, or obligors participating in the hearing. Whether a certified court reporter shall be used to create the official recording of the proceedings shall be determined by the Administrative Law Judge conducting the hearing before commencement of the hearing.

(c) If the hearing was recorded by the Appeals Board and a party, intervenor, or obligor wishes to have the hearing recording transcribed by a certified court reporter and have the transcript become the official recording, the parties, intervenors, or obligors shall make arrangements with a certified court reporter to have the recording transcribed. The transcript shall not be the official recording of the hearing proceedings unless all parties stipulate that the hearing recording may be used as the official recording and an Administrative Law Judge or the Appeals Board issues an order making the transcript the official recording of the hearing. A copy of the transcript must be provided to the Appeals Board at no cost to the Appeals Board. Any costs associated with the use of a court reporter to transcribe a hearing recording shall be paid by the party requesting the transcript or other arrangement by stipulation among all of the hearing participants.

(d) Notwithstanding the provisions of subsections (a) through (c), as required in Labor Code Section 6628, the Board shall be responsible to certify the record submitted to the reviewing court.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 6603, 6608, 6620, 6621 and 6629, Labor Code.

376.8. Administrative Law Judge Preparation of Hearing Record.

The Appeals Board or the assigned Administrative Law Judge shall create a hearing record as defined by Section 347, subsection (r), and shall:

(a) Mark the face of each documentary exhibit in accordance with the following designations:

- (1) Division exhibits shall be consecutively marked with numbers beginning with the number "1."
- (2) Employer's exhibits shall be consecutively marked with letters beginning with "A." If every letter of the alphabet is used, then the lettering shall continue with the designation "AA" throughout the remaining alphabet.
- (3) Third-party exhibits shall be labeled "Third-party – 1" and consecutively thereafter.
- (4) Joint exhibits as agreed to by the parties shall be marked as "Joint-exhibit-1" and consecutively thereafter.
- (5) Physical, mechanical or demonstrative evidence returned to a party for storage during the pendency of the litigation pursuant to Section 376.4 shall be identified in both the recorded and written hearing record pursuant to subsections (1) through (4) above.
- (6) Sealed or confidential exhibits shall be identified and labeled in the recorded and written hearing record pursuant to subsections (1) through (4) above, with the Administrative Law Judge selecting identifying labels that do not reveal the confidential nature of the sealed or confidential exhibit(s).
- (7) Documents may be redacted by the Administrative Law Judge to conceal confidential information that is not relevant to the issues being heard.

(b) At the conclusion of the hearing and closure of the evidentiary record, transmit the paper exhibits entered into evidence to the scanning technician, who shall, within two working days of receipt, scan the exhibits into the "hearing record" portion of the electronic case file.

(c) Attach to the decision a summary of the entire evidentiary record labeled "Addendum A." Addendum A shall contain a list of all exhibits entered into evidence and the proponent of that evidence, the identity of witnesses testifying at the hearing, any exhibits that were offered as evidence and marked as an exhibit but were excluded from the evidentiary record, whether the hearing was electronically recorded or recorded by a certified court reporter, and the following certification:

I, "ALJ Name", the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter, along with the documentary and other

evidence presented and received into evidence during or after the hearing, constitutes the official hearing record of the proceedings. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 6603, 6608, 6620, 6621 and 6629, Labor Code.

378. Representation at Hearing.

(a) A party may appear in person or through a representative who is not required to be an attorney at law. A representative shall file a written notice of representation with the Sacramento Office of the Appeals Board and serve a copy on all parties as required by Sections 355.3 and 355.4. ~~Service shall be in a manner prescribed in Section 355(e) and proof of such service meeting the requirements of Section 355(e) shall be filed with the Appeals Board.~~

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding.

(c) An employee who is represented by an authorized employee representative may appear through such authorized employee representative.

(d) A representative may withdraw its representation of a party by filing a written notice of withdrawal with the Appeals Board and by serving a copy on all parties, intervenors, and obligors as required by Sections 355.3 and 355.4. ~~Service shall be in a manner as prescribed in Section 355(e) and proof of such service meeting the requirements of Section 355(e) shall be filed with the Appeals Board.~~

NOTE: Authority cited: Sections 148.7 and 149.5, Labor Code. Reference: Sections 148.7 and 149.5, Labor Code.

380 Briefs.

(a) A motion for leave to submit a written post hearing brief shall be made prior to the close of the hearing and shall be granted in the discretion of the Administrative Law Judge or the Appeals Board. Either by motion for leave to file a post-hearing brief made by a party or at the request of the Administrative Law Judge, upon a determination that the brief will be productive and will not unreasonably delay the disposition of the proceeding-, a post-hearing brief may be filed. Post-hearing briefs shall be filed simultaneously on a date certain ordered by the Administrative Law Judge. The Administrative Law Judge may alternatively order a different briefing schedule for the filing of post-hearing briefs. A party shall file its brief within 15 working days from the date of the hearing. Opposing parties may file an answer within 10 working days from service of the brief. The Administrative Law Judge or the Appeals Board, upon a showing of good cause, may extend or reduce the above filing dates for submission of a brief. Service on a party of the post-hearing brief shall be in a manner as prescribed in Section 355(e).3 and proof of such service meeting the requirements of Section 355(e).3 shall be filed with the Administrative Law Judge or the Appeals Board post-hearing brief. The original brief shall be filed with the Appeals Board pursuant to Section 355.4 on or before the date specified by the Administrative Law Judge. An original brief shall be filed with the Appeals Board in Sacramento, with a copy provided to the administrative law judge assigned to the hearing.

(b) Post-hearing briefs shall be limited to 15 pages and consistent with provisions of Section 355.5 related to preparation of documents, unless larger documents are allowed by order of the Administrative Law Judge.

(c) Post-hearing briefs shall contain reference to definitive legal authorities in support of a party's contentions made at the hearing.

(d) An Administrative Law Judge has the discretion to require pre-hearing briefs when briefing would assist the Administrative Law Judge and the parties in identifying or clarifying issues for the hearing or other issues arising before the hearing.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 149.5, Labor Code.

383. Failure to Appear.

(a) If after service of a notice of hearing, ~~notice of consolidated hearing, prehearing conference, settlement conference, or continuance,~~ status conference, or another event scheduled and duly noticed by the Appeals Board, a party fails to appear at a hearing the noticed event, either ~~in person~~ personally or by representative, the Appeals Board may take the proceeding off calendar; may, after notice, dismiss the proceeding; or may receive evidence from any party that appears.

(b) Before dismissing the proceeding, the assigned Administrative Law Judge shall prepare and serve a notice of intent to dismiss the appeal or citation(s), or an order pursuant to Section 350.4, allowing the non-appearing party at least 10 days to request reinstatement of the appeal. The request must show good cause for missing the noticed event.

(c) Good cause is defined as sufficient facts to establish a reasonable basis for the failure to appear. A request for reinstatement, and any opposition, shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant and declared under penalty of perjury.

(d) A party, intervenor, or obligor opposing the reinstatement of any proceeding based on the non-appearing party's showing of good cause may file a response no later than 10 days from service of the reinstatement request.

(e) Service of the request for reinstatement and any response shall be accomplished as prescribed in Section 355.3 and proof of service meeting the requirements of Section 355.3, subsection (e) shall be filed with the Appeals Board as required in Section 355.4.

~~(b) Any proceeding may be reinstated by the Appeals Board if the non-appearing party files a written motion, no later than ten (10) days after receipt of notification of intent to dismiss, that contains sufficient facts to establish a reasonable basis for the failure to appear at the hearing. A party opposing the reinstatement of any proceeding may file a response no later than ten (10) days from service of the reinstatement request. The motion and response shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant. Service shall be in a manner as prescribed in Section 355(c) and proof of such service meeting the requirements of Section 355(e) shall be filed with the Appeals Board.~~

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5, 6603 and 6611, Labor Code.

391.1. ~~Filing of~~ Petition for Reconsideration — ~~Date~~.

(a) A petition meeting all requirements of these regulations and the Labor Code shall be deemed filed on the date indicated on the proof of service. If there is no proof of service, the date of filing shall be the date of ~~hand~~ delivery to the Sacramento Office of the Appeals Board ~~or the mailing date~~.

(b) A petition that is not properly verified upon oath and/or not accompanied by a proof of service shall be considered filed in accordance with subsection (a) if the petitioner perfects the petition by filing the verification and/or proof of service within five days of the date of service of a letter from the Appeals Board noting the omission(s).

(c) Failure to perfect a petition in accordance with ~~S~~subsection (b) shall result in the dismissal of the petition.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 6614, 6615, 6620, 6624 and 6625, Labor Code.

392. Proof of Service During Reconsideration Process.

A petition for reconsideration, supplemental petition, answer, and supplemental answer shall be served on all parties who have been joined in the proceeding at the time of filing. Service shall be in a manner as prescribed in Sections 355(e).3 and 355.4 and proof of such service meeting the requirements of Section 355(e).3, subsection (e) shall be filed with the Appeals Board, pursuant to Section 355.4.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5, and 6619, Labor Code.

392.4. Motions During Reconsideration Process.

(a) Any motion or request for action, any opposition thereto, and any reply relating to any proceeding under reconsideration by the Appeals Board shall be in writing and directed to the Appeals Board's Sacramento office. The caption of each motion, request, opposition or reply shall contain the title and docket or petition number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefor.

(b) Any motion or request, or opposition thereto, and any reply shall be signed by the party filing or by the party's representative, and a copy shall be served on all parties. Service shall be in the manner prescribed in Sections 355(e).3 and 355.4 and proof of service meeting the requirements of Section 355(e).3, subsection (e) shall be filed with the Appeals Board.

(c) Unless otherwise ordered, a motion or request may be served and filed at any time after reconsideration has been granted, but no later than 45 days before the date set forth in subsection (1) below:

(1) The Appeals Board shall notify the parties at least 90 days prior to the last day for making motions or requests relating to any proceeding under reconsideration.

(2) A motion or request shall be served and filed no later than 45 days before the date specified by the Appeals Board in 392.4(c)(1).

(3) Any opposition to such motion or request shall be served and filed no later than 30 days from service of the motion or request.

(4) Any reply papers shall be served and filed no later than 15 days from service of the opposition papers.

(d) A request to file a motion, request, opposition or reply later than the times specified in 392.4(c) may be granted in the Appeals Board's discretion if accompanied by a declaration showing good cause for the late filing.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 6617 and 6620, Labor Code.

392.5. Availability of Recording Media.

(a) The Appeals Board shall promptly provide a copy of the recording of the hearing to any requesting party upon receipt of a written request. The request may be made in person, by mail, ~~or by facsimile,~~ by email at the email address published on the Appeals Board's website, or electronically through the Appeals Board's website.

(b) ~~A party may request that the recording copy be sent via overnight delivery.~~ The person or entity making the request shall provide an email address where the recording of the hearing may be sent.

(c) If a requesting person or entity does not possess an email address or does not wish to receive a hearing recording by email, that person or entity may request that the recording be sent by alternate means. The requesting person or entity ~~party~~ shall bear the cost of reproduction and delivery if the request is for delivery by alternate means.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 149.5, 6621 and 6629, Labor Code.